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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 561

JOHN KASPER, *Petitioner,*

v.

STATE OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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Petitioner prays for a writ of certiorari to the Supreme Court of the State of Tennessee which affirmed judgment of the Criminal Court of Davidson County, Tennessee, finding petitioner guilty of inciting to riot, sentencing him to six months' imprisonment and to pay a fine of Five Hundred Dollars (App. No. 8a).

OPINION BELOW

The opinion of the Court below has not yet been officially reported. Copy of the opinion and judgment are annexed hereto and printed in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on July 27, 1959 (App. No. 8a). A Petition for a Rehearing was denied on September 3, 1959 (App. No. 9a). The jurisdiction of this Court is invoked pursuant to the provisions of 28 United States Code, Section 1257 (3).

QUESTION PRESENTED

Are the speeches made and printed material circulated by the petitioner which formed the basis for the charge and conviction of the common law offense of "inciting to riot" protected under the First Amendment of the United States Constitution?

STATEMENT OF THE CASE

The petitioner was convicted of the common law offense of inciting to riot (App. 8a) and sentenced to serve for a period of six (6) months in the Davidson County, Tennessee, workhouse and pay a fine of $500.00 (App. 8a).

The summary of the testimony is covered extensively in the lower Court's opinion so will not be repeated here (App. 1a).

In the Court's opinion, it was stated (App. 6a):

> "The defendant's insistence is that he does not believe in violence and has never at any time advocated violence; that he came here for the purpose of promoting friendly race relations. He admits the general tenor of statements attributed to him by numerous witnesses, but insists he was simply quoting the predictions of others."

A reading of the entire opinion of the Court is urged.

REASON FOR GRANTING THE WRIT

Are the Speeches Made and Printed Material Circulated by the Petitioner Which Formed the Basis for the Charge and Conviction of the Common Law Offense of "Inciting to Riot" Protected Under the First Amendment of the United States Constitution?

Stating the reason for granting the writ another way: "Are the "freedom of speech" and "freedom of press" protections under the first amendment absolute with respect to a prosecution for "inciting to riot" under the common law; the State of Tennessee having no statute making inciting to riot a crime?"

In the case of *Terminiello* v. *Chicago*, 337 U.S. 1 (1949) a Chicago ordinance was judicially interpreted to permit punishment for breach of the peace for a speech which "stirs the public to anger, invites disputes, or bring about a condition of unrest". In that case a riot had actually occurred and the speech in question had in fact "provoked a hostile mob, incited a friendly one, and threatened violence between the two". The Court reversed a conviction under the ordinance and Justice Douglas wrote:

> "A function of free speech under our system of government is to invite dispute. It may, indeed, best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudice and preconceptions and have profound unsettling effect as it presses for acceptance of an idea. This is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

The length to which the Supreme Court has gone in protecting freedom of speech is illustrated in the case of *Yates et al.* v. *United States*, 354 U.S. 298, 77 S. Ct. 1064, and the issues in that case were whether or not it was a violation of the Smith Act:

> ". . . to advocate and teach the duty and necessity of overthrowing the government of the United States by force and violence and (2) to organize as the communist party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force and violence as speedily as circumstances would permit."

This Court held that those persons had the right to advocate the overthrow of our government by force and violence so long as it clearly remained in the realm of advocacy.

In the Court's opinion below it will be noted that the Court stated (App. 5a):

> "At this meeting there was passed out with the name of the defendant (petitioner) on the reverse side of same printed material that stated that these were the last days of peace between the white and negro races and tended to question the motive and sincerity of national, state and county officials and urged that the white people stiffen their backs and prevent integration of schools with their shotguns. There was also passed out by the defendant or those aiding him in the conduct of his meetings and speeches a picture of a negro boy kissing a white girl."

The cases that are pertinent in this connection are *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 77 S. Ct. 722; *Dennis* v. *United States*, 341 U.S. 494, 71 S. Ct. 357; *Bridges* v. *California*, 314 U.S. 252, 62

S. Ct. 190; *Schware* v. *New Mexico*, 353 U.S. 232, 77 S. Ct. 752.

In *Konigsberg* v. *State Bar of California*, *supra*, the Court said at page 269:

> "Because of the very nature of our democracy such expressions (an article he wrote saying this Court had sold out to the enemy, meaning fascists) of political views must be permitted. Citizens have a right under our constitutional system to criticize government officials and agencies. Courts are not and should not be immune to such criticism." (citing *Bridges* v. *State of California*, *supra*).

In the Dennis case the history of the "clear and present danger rule" is discussed and delineated and this Court apparently agrees with Justice Holmes' statement in *Schenck* v. *United States*, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent".

The prosecution in this case proceeded upon the common law offense. There is no statute in Tennessee making inciting to riot a crime. The Tennessee constitution gives even a wider scope in its Bill of Rights than the Bill of Rights to our federal constitution. It would be gravely doubtful if the Tennessee legislature could legally enact a statute making it an offense to "incite to riot" in view of absolute protection its constitution gives on speech and press matters.

Article I, Section 1 of the Declaration of Rights, Constitution of Tennessee, provides:

> "That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness; for the advancement of those ends they have at all times, an inalienable and indefensible right to alter, reform or abolish the government in such manner as they may think proper."

Section 19, Declaration of Rights, Constitution of Tennessee, provides:

> "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty . . ."

The record in this case shows that the prosecution was based entirely upon the speeches made by the petitioner and the printed material put out in connection with his speeches.

The Court will observe that the entire case against Petitioner is that the modus operandi of the commission of the common law crime of inciting to riot was by oral and printed words. Counsel has examined the cases cited herein and others and believes that the freedom of speech and freedom of the press protections of the First Amendment are absolute in this situation. Tennessee has a written constitution and statutes covering the usual crimes. Petitioner was not charged and convicted of violating any statute of Tennessee, but instead is charged and convicted of a common law crime by written and oral words. Tennessee is a very old state, carved out of the Territory of North Carolina, and its legislature has been active during its history as a state, as a casual glace at its Code will illustrate. But

its legislature has never made "inciting to riot" a crime, and as set forth earlier herein, this is undoubtedly due to the broad protections its written constitution rightly gives these two great freedoms (speech and press).

CONCLUSION

It is the position of the Petitioner that freedom of speech and of the press are absolute so far as forming the basis for an offense known only to the common law. This being a case of first impression so far as Petitioner can ascertain, it is urged that certiorari be granted.

Respectfully submitted,

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